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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1552~~ 70-113

FORD MOTOR COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA

and

THE ELECTRIC AUTOLITE COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

APPELLANT'S REPLY TO MOTION TO AFFIRM

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The Government's Motion to Affirm fails to show "that it is manifest that the questions on which the decision . . . depends are so unsubstantial as not to need further argument." (Supreme Court Rule 16(c).) The thinness of the Motion itself demonstrates the clear need for plenary review, and the Motion should be denied.

I. The Substantial Questions As to Whether the Acquisition Violated Section 7 of the Clayton Act.

The trial court premised a violation on two hypothetical grounds:

> (1) elimination of a supposed moderating effect by Ford on aftermarket sales, and
>
> (2) elimination of a theoretical opportunity to try to supply spark plugs to Ford.

The grounds, however, do not support the violation, and Ford presents substantial questions in this regard. (J.S. 10-16.) Ford has demonstrated the absence of legal precedent and the lack of record support as well. The Government's Motion does nothing to detract from the substantiality of the issues raised.

Supposed Moderating Effect

The Motion attempts first to deal with the supposed moderating effect of Ford. Yet the Government can find no support in the record. From more than 6,000 pages of testimony, depositions and exhibits, it cites only the following: (1) A Ford officer testified as to what Champion "could . . . have done" if Ford had been on the brink of internal integration, which it was not (Tr. 2004); (2) A Champion officer testified that he felt that Champion could have retained Ford as a customer if its OE price was satisfactory. (Tr. 717-18.)

There simply is no evidence that Ford moderated the aftermarket, and the Government failed to sustain its burden of proof. The evidence is that dominant Champion, with 50% of the market, sold OE plugs at far below manufacturing costs to deter Ford from producing its own spark plug requirements. (J.S. App. A, p. 79.) This scheme boosted, not moderated, Champion's aftermarket prices; and Champion's overall profitability was among the highest in American industry. (See J.S. 13.)

The law, too, fails to support a violation. The Government apparently contends that an acquisition violates Section 7 if it "removes from a market a firm whose presence on the edge of that market has been a significant incentive to competition." (Motion p. 15.)*

This very statement of the principle demonstrates a fundamental error of the trial court. Even if Ford had been on the edge of the market, antitrust analysis would have required inquiry into the total effect of the acquisition. It would have required recognition that Ford's actual competition against the two industry giants, who then held 80% of the market, was a far more pro-competitive force than the market had experienced in half a century. The trial court erred in failing to give regard to the pro-competitive effects of Ford's entry.

The Government argues that the increased ability of the weak third company to compete against its giant competitors is irrelevant. The Motion misinterprets Ford's argument as an attempt to justify an otherwise proscribed acquisition. (Motion p. 17.) The increased ability to compete is, rather, an aspect of the more effective competition that the acquisition has produced.

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* The authorities cited by the Government do not support its proposition. *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967) held an acquisition impermissible under Section 7 where it entrenched the clearly dominant producer of a chemically indistinguishable product, whose closest rival was but one-third its size; the acquisition brought overwhelming marketing and advertising power to the dominant company; and the market was theretofore characterized by low barriers to entry. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) held that no violation could be found upon entry of a joint venture unless either both joint venturers would have entered the market independently or one would have so entered and the other would have remained at the sidelines threatening to enter. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) held illegal a merger of direct competitors, one of whom was a limited monopolist and the other an unsuccessful bidder in the same market.

Theoretical Opportunity

The second prong of the trial court's opinion on the merits relates to the supposed disappearance of a theoretical opportunity to try to supply Ford. The trial court supposed, contrary to fifty years of pre-acquisition market history, that such an opportunity existed.* The finding of a violation on this ground is unprecedented.

The Government tries to support the trial court by citing *Brown Shoe* v. *United States*, 370 U.S. 294 (1962). *Brown Shoe*, however, relates not to hypothetical foreclosure but to actual foreclosure of smaller rivals. (See Motion p. 18.) In *Brown Shoe* the effects of the foreclosure were entirely anticompetitive. Here, the effect of the acquisition was to dislodge Champion, the entrenched, dominant producer, and to force Champion to compete in the sale of both OE and private label brands.

It further appears that the Government has used artificial percentages. The Motion (p. 19) states a percentage of an "available OE market" which purports to be the market share foreclosed. This synthetic market definition excludes General Motors, which makes its own spark plugs as a result of its acquisition of AC. More importantly, it excludes sales in the entire aftermarket, although aftermarket sales as of 1964 represented more than 85% of the entire market. (Ex. G-161.) In the same year Ford's OE requirements represented only 3.8% of the entire market. (*Ibid.*)

The "available OE market" is not a market. It certainly is not a market in issue. It was not regarded as a market

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* As evidence of alleged efforts by spark plug manufacturers to "compete with" Champion for Ford's business prior to the acquisition, the Government cites two letters. Each letter offered to supply Ford with OE spark plugs under Ford's brand name at prices in excess of 26 cents per plug. (Tr. 2173, 2240; Ex. F-82, F-85.) Such a price was obviously too high to be of interest to Ford. (See Ex. F-83.)

by the court below, and it cannot fairly be used as such here. In any event, the Government's attempt to measure the supposed opportunity "foreclosed" presupposes a meaningful opportunity to try, and there never has been one.

II. The Substantial Questions Regarding Novel Relief.

Contrary to the Motion (p. 12), the trial court wholly disregarded Ford's relief proposal. It substantially adopted the proposal that the Government had advanced to "break the OE tie." The judgment orders divestiture and contains the following unprecedented and extraordinary provisions:

> (1) Ford is enjoined from using its own name on its own plugs for five years. It is prohibited even from selling a spark plug under its own name.
>
> (2) Ford is enjoined from entry into the manufacture of spark plugs for ten years, even though the injunction would forestall actual and potential competition.*
>
> (3) Ford is required to purchase half its requirements of plugs under the Autolite name from the divested company for five years.

The Government's Motion cites no precedent in any litigated court decree for the imposition of such far-reaching restrictions that interfere not only with competition but with basic proprietary rights. Counsel for Appellant has likewise found none. The novelty of the relief and the grave question as to its propriety should alone require plenary review by this Court.

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* The Government acknowledges that, absent the acquisition, the trial court could not have barred Ford's internal entry (Motion p. 10, n. 7); yet it would sanction the use of the acquisition as an occasion to achieve the same result.

According to the Motion, the district court's decree is designed to recreate the pre-acquisition market structure.* By its theme of return to the *status quo ante*, the Government advocates nothing more than a return to a market in which price competition had had no effect.** For 25 years there had been no change of exclusive-sourcing patterns and no significant new entrant, and the smallest significant supplier had been a weak third.

Moreover, the excessive injunctions of the decree ensure that there will be no return to the pre-acquisition market. The decree effectively enjoins Ford from potential entrant status for ten years. It invites engrossment by Champion and General Motors, who already have more than 75% of the aftermarket, and who in all probability will rush into and absorb a major portion of Ford's 19-percent aftermarket share. (J. S. 16-20.)

This is not restoration at all. It substantially eliminates the only effective competition against the two market giants. It freezes Ford into a grave competitive disadvantage, and amounts to the imposition of a severe penalty not authorized as relief under Section 7. A result so egregious should not be endorsed by this Court out of hand.

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* In fact, the relief goes far beyond an attempt to reestablish that *status quo ante*. See J. S. 21-22.

** The Government's own witness testified that the spark plug is not price sensitive. (R. Tr. 105-107, 136-137; see J. S. 12.) Ford did underprice General Motors and Champion in the six years following the acquisition, but received no market share benefit. (Ex. FR-13; R. Tr. 370-74.) Ford has since emphasized delivery capability, diversion of franchised dealers' patronage to independent suppliers, and technical instruction and assistance. (R. Tr. 303-314.) An increase in competition following the acquisition is evidenced by the concession of the Government's witness that dominant-Champion's return on investment declined by 30% after the acquisition. (R. Tr. 105-107, 136-137.)

The Government's references to the familiar principle that ordinarily relief lies solely within the province of the district judge does not meet the issue here. This case does not involve the ordinary and conventional relief where familar experience may guide discretion. It involves extreme relief confected to deal with hypotheses that are at least extraordinarily doubtful and that are designed to prevent for long periods even the exercise of the basic rights of internal entry and the use of one's own name. The propriety of such novel relief presents a substantial question fully worthy of adequate appellate review.

Moreover, in accordance with settled law as noted in *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316 (1961):

> "'The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus bypassing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done.' *International Boxing Club* v. *United States*, 358 U. S. 242, 253 (1959); see also *id.*, at 263 (dissenting opinion)." *Id.* at 323. (Brennan, J.)

CONCLUSION

Appellant submits that it would sacrifice fairness to speed for the Court to dispose of the grave questions raised by this appeal without a full presentation based upon examination of the record, briefing, and oral argument, and it respectfully urges that jurisdiction be noted.

Respectfully submitted,

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